between 'illegality' and 'irregularity'. The sole criterion given by section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the court to do justice, but, if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong.' See also Emperor v. Bishan Sahai Vidyarthi I.L.R. 55 All. 779."

In *Subramania's case*[1] their Lordships were unable to regard "the disobedience to an express provision as to a *mode of trial* as a mere irregularity." "The mischief" they said "sought to be avoided by the statute has been done. The effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury" (L.R. 28 I.A. at p. 263). It is clear from the judgment that in referring to "disobedience to an express provision as to a mode of trial" their Lordships considered that the illegality consisted in the trial at one and the same time of a multitude of charges and not the joinder of the various charges. As the Lord Chancellor remarked in the course of arguments by counsel for the respondent (L.R. 28 I.A. at p. 262): "It is not the joinder that is wrong. It is the trial of all offences at the same time." The mischief sought to be avoided by section 164 is not so much the joinder of more than three charges as the more than three charges forming part of a single trial. The joinder of charges by itself is not an illegality which cannot be cured by the provisions of section 422 of the Criminal Procedure Code.

I do not think that if a person accused of more offences of the kind mentioned in section 164(1) were charged with more than three such offences but separate trials were conducted in respect of such not more than three offences at each trial, the trials would be vitiated and null by reason only of the irregularity in the original joinder of charges.

In the case of this appeal the appellant did not claim trial but pleaded guilty to all four charges. There was, therefore, no trial for the purposes of section 154 of the Criminal Procedure Code and there could be no mischief which was sought to be avoided by the said section.

For the above reasons the appeal as to conviction must fail. The learned Deputy Public Prosecutor submitted that the offences in question have been committed as a result of one series of acts so connected together as to form one transaction and that therefore section 165(1) of the Criminal Procedure applies. In view of the conclusion I have arrived at with regard to the provisions of section 164 it is not necessary for me to deal with the question raised by the learned Deputy Public Prosecutor.

With regard to sentence, the learned Counsel for the appellant submitted that from the grounds of judgment it is clear that the learned President considered that the offences in the last three charges were not of so serious a nature as the offence in the first charge but this notwithstanding the maximum fine was awarded in respect of all offences. I fully agree with this submission and consequently reduce the fine on the second charge to $300 and the fines on the third and fourth charges to $100 each. The order of the learned President is altered accordingly. Any amount in excess of the fines so fixed, that is a total of $1,000, if paid, is to be refunded to the appellant.

Sentence reduced.

Solicitors for the appellant: *Bannon & Bailey.*

SEET SOON GUAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Buhagiar J.) July 15, 1955]

[K. L. — Criminal Appeal No. 47 of 1955]

Penal Code, ss. 25, 465 & 471 — Fraudulently using as genuine a forged document — Meaning of "fraudulently".

This was an appeal against the conviction and sentence of the appellant on a charge of fraudulently using as genuine a 1953 official Police Diary an offence punishable under ss. 465 and 471 of the Penal Code. It was found at the trial by the learned President of the Sessions Court that the appellant had used the Police Diary which was a false document and which he knew was a false document, in disciplinary proceedings in order to bolster up his defence to the disciplinary charges preferred against him. The defence at the trial was based on the contention, that even assuming that the appellant had knowingly made use of the false diary in such circumstances as the prosecution allege for the purpose of getting himself out of trouble, that does not amount to fraudulent user. The appeal was argued on the correct meaning of the term "fraudulently" in the relevant sections of the Penal Code.

Held: (1) neither the acquisition nor the deprivation of property is an essential ingredient of the intent to defraud; (2) "fraudulently" does not necessarily connote deceit and injury to the person deceived, it may but it need not do so; a person acts fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception either an advantage should accrue to him or injury, loss or detriment should befall some other person or persons.

Cases referred to:—

(1) *Loo Wee Wan v. Regina* (1955) M.L.J. 73.

(2) *R. v. Wines* (1953) 2 All E.R. 1947; 37 Cr. App. R. 197.

(3) *Sanjiv Ratanappa Ronad v. Emperor* A.I.R. 1932 Bom. 545; I.L.R. 56 Bom. 488.

(4) *Emperor v. Mohit Kumar Mukerjee* A.I.R. 1926 Cal. 89.

(5) *Queen-Empress v. Abbas Ali* I.L.R. 25 Cal. 512.

(6) *Baij Nath Bhagat v. Emperor* A.I.R. 1940 Patna 486.

(7) *Queen-Empress v. Soshi Bhushan* (1893), I.L.R. 15 All. 210.

(8) *Kotamraju Venkatrayadu v. Emperor* (1905), 25 Mad. 90 (F.B.).

(9) *R. v. Bassey* 22 Cr. App. R. 160; (1931), 47 T.L.R. 22.

(10) *Re London & Globe Finance Corporation Ltd.* (1903) 1 Ch. 728.

(11) *Starey v. Chilworth Gunpowder Co.* (1889), 24 Q.B.D. 90.

MAGISTRATE'S CRIMINAL APPEAL.

The facts of this case as set out in the judgment of the President, Sessions Court, are as follows:—

"The accused is, and was at all material times a Senior Police Inspector, attached to Criminal Intelligence Department, Headquarters, Kuala Lumpur. Towards the latter part of 1954 he was charged with certain disciplinary offences under the Police Regulations, 1952. Those Regulations are made by the Chief Secretary in exercise of the powers conferred upon him by section 81 of the Police Ordinance. They prescribe the manner in which such disciplinary offences are to be charged, the person (known as "the adjudicating officer") authorised to inquire into such charges, the procedure to be followed at such inquiry, and the different forms of punishment that may be imposed by the adjudicating officer consequent upon conviction.

The gist of the offences charged against the accused was that on or about the 20th May, 1953 he had been guilty of neglect of duty in that he had failed either to take lawful measures for the apprehension of a named person who had offered him a gift of a sum of money in circumstances which must have led him to believe that the offer amounted to a bribe, or to make any report with regard to the said offer to a superior officer, and that during the same month of May he had been guilty of conduct to the prejudice of good order and discipline in that he had improperly associated with the same person, whom he had reason to believe to be a person of bad character and a trafficker in opium.

In his defence the accused put in two written statements and what purported to be his 1953 official Police diary. The statements contained numerous references to entries in his diary in support of his defence. The adjudicating officer in charge of the inquiry acquitted the accused on the charges preferred against him. It is manifest that he did so on the strength of the statements of two senior police officers both of whom stated that the accused had in fact reported to them that the person referred to in the charge had tried to bribe him. In the course of the inquiry, and before delivering his decision, the adjudicating officer entertained certain doubts as to the genuineness of some of the entries made — (and, indeed, as to the genuineness of the whole diary itself) — in the 1953 official diary produced by the accused in support of his defence. Accordingly, after acquitting the accused he called for, and obtained, the diary from him.

It was subsequently submitted to the Government Chemist Mr. Biggs for examination. Mr. Biggs has given evidence as to what he found, as the result of both microscopical and chemical examination of the diary. It is unnecessary to describe in any detail the result of his examination. Suffice it to say that he found signs of an erasure on the cover of this so-called 1953 official diary and, as the result of the chemical tests that he applied, clear and unmistakable evidence on page 62 of the diary that attempts had been made to erase certain original entries for the days of August 3rd and 4th, and that those original entries had been written over in the same handwriting as that which now forms the rest of the diary. One, Balwant Singh, gave evidence as a witness for the prosecution. He said that in November, 1953, he was employed at the Quartermaster Stores, Police Headquarters. When he took over the stores there were three unissued 1953 diaries in the store. Two he left in the store and one he took out to use in his office for occasional jottings if required. He identified the erased (and subsequently chemically reconstituted) handwriting on page 62 of the diary as being in his own handwriting. He said that the entry for the day Tuesday, August 4th, had been made by him to remind him of an order for paint he received on that day from the Police Depot. He had deleted Tuesday and written — and wrongly spelt — "Wednesday" — because the diary — being a year out of date — it was in fact Wednesday. He had done the same for the previous day, altering the diary from Monday to Tuesday.

As a result of the chemical treatment of these entries in the diary, the original entries of Tuesday and Wednesday (wrongly spelt) are now clearly visible and — rather more faintly — references to paint — such references now being written over in the same handwriting as the rest of the diary. The witness stated that, apart from the jottings for August 3rd and August 4th, he could not remember having made any other entries in the diary. The accused had not thought fit to give evidence on his own behalf. Mr. Rintoul who has most ably conducted the defence, has said and I, of course, accept it — that such a course was taken by the accused on his advice. It does not, however, alter the fact that the accused has made no attempt to meet the charge on the facts alleged against him of fraudulently making use of an official diary in police disciplinary proceedings preferred against him, which he knew or had reason to believe at the time he used it, was a forged document.

On the evidence before me, I am abundantly satisfied that:—

(1) the so called official 1953 Diary which the accused produced in evidence on the 4th November, 1954, in the course of police disciplinary proceedings against him, was the diary which disappeared from the possession of Corporal Balwant Singh sometime subsequent to the 4th August 1954 — and in which, of course, entries had been made by Balwant Singh for the 3rd and 4th August, 1954;

(2) that it was a false document in the sense that it purported to be an original day-to-day record of the accused's movements and activities in the course of his duty, whereas it clearly was not such an original document;

(3) that the accused made use of it in those proceedings well knowing that it was a false document; and

(4) that he made use of it specifically with regard to certain references contained therein in order to bolster up his defence to the disciplinary charges preferred against him."

R. Ramani (*R. H. V. Rintoul* with him) for the appellant.

E. Brown (Federal Counsel) for the respondent.

Buhagiar J.: — This is an appeal against the conviction and sentence by the Sessions Court, Kuala Lumpur, on the following charge:—

"That you on the 4th day of November, 1954 at Police Headquarters, Bluff Road, Kuala Lumpur, in the course of disciplinary proceedings against you under the Police Ordinance, 1952, fraudulently used as genuine a certain document to wit a 1953 official Police Diary which you knew or had reason to believe at the time you used it to be a forged document and that you thereby committed an offence punishable under sections 465 and 471 of the Penal Code (Cap. 45)."

The facts are not in dispute; they are fully set out in the judgment of the learned President and need not be re-stated here.

At the trial before the learned President the defence was based on the purely legal contention that, even assuming the accused knowingly made use of the false diary in such circumstances as the prosecution allege, for the purpose of getting himself out of trouble, that does not amount to fraudulent user — fraud being an essential ingredient in the charge.

The appeal was argued on the correct meaning of the term "fraudulently" in the relevant sections of Chapter XVIII of the Penal Code.

The Penal Code has been taken textually from the Indian Penal Code and Indian cases are continually being referred to in the Courts of this country; they are considered of persuasive authority and are frequently relied on and followed. There are innumerable cases on the meaning of the term "fraudulently" but the matter does not seem to have been considered by the Courts of this country. No cases have been quoted to me and I am not aware of any. Mr. Ramani, who appeared with Mr. Rintoul for the appellant referred to a Singapore case, *Loo Wee Wan v. Regina*[1] decided by the Court of Criminal Appeal of Singapore. Although the judgments of the Courts of the Colony of Singapore are considered by the Courts of the Federation with great respect, they are not binding on the Courts of the Federation. The report does not give the facts of the Singapore case but it appears that there was a charge under section 477A of the Penal Code and that the appellant had been convicted of falsification of accounts. The English case of *R. v. Wines*[2] seems to have been quoted to Court and it would seem that reference was made by Counsel to Bombay, Allahabad and Calcutta cases under the Indian Penal Code: Murray-Aynsley C.J. delivering the judgment of the Court said:—

"Fraud involves deceit. It also involves a course of action on the part of the person deceived by which he suffers detriment but this detriment must be loss of money or other property" . . . . And later; "We think that in the cases under the Indian Penal Code the Bombay cases are to be preferred to those of Allahabad and Calcutta (see Ratanlal, 17th edition p. 1178)".

There is no account in the report of the arguments before the Court and although the concrete decision is clear, the abstract *ratio decidendi* is obscure; in default of the logic of the argument, the analysis of prior cases and the statement of the historical background, the persuasive value of a judgment is much reduced.

The matter was argued before me and the learned counsel for the appellant and the D.P.P. Mr. Brown have given me great assistance in this case; but after consideration of the points raised, with great respect, I am unable to accept the view in *Loo Wee Wan v. Regina*[1].

The meaning of the term "fraudulently" has been considered in innumerable Indian cases. There is general agreement in these cases that deception is an essential ingredient in the "intent to defraud" and that deception by itself does not constitute fraud. There is, however, no consensus of opinion as to the second element in the "intent to defraud". There are two lines of cases, which may be referred to as the Calcutta cases and the Bombay cases, though not restricted to those particular territories. The Bombay cases, of which *Sanjiv Ratanappa Ronad v. Emperor*[3] is an example and on which the appellant relied, take the view that defraud implies deprivation of property or injury or risk of injury to an individual or to the public, and that it is not enough to show that the deception was intended to secure an advantage to the deceiver. The Calcutta cases take a wider view and hold that such deprivation or loss or injury is not essential and there is an intent to defraud if by the deception the deceiver intends to acquire an advantage; an example of this is the case of *Emperor v. Mohit Kumar Mukerjee*[4].

A meaning of the term "fraudulently" is given in section 25 of the Penal Code which states that "a person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." As a definition this section is defective inasmuch as it is content to define one word by another itself requiring definition and the Code does not define "to defraud". The purpose of this section is to limit the sense of the term for the purposes of the Code. "Fraud" is defined in the Indian Contract Act and the definition appears in the Contract (Malay States) Ordinance, 1950. By virtue of this section in the Penal Code, fraud does not bear the extensive meaning in which that term is ordinarily understood in the law of contracts. In various English and local statutes the phrase 'with intent to deceive' is used with the phrase 'with intent to defraud', and the words 'but not otherwise' have the effect of reiterating the common law principle according to which the *mens rea* required was an intention not merely to deceive but also to defraud.

The correct meaning of the term "fraudulently" is to be sought by consideration of the context in which that term is used in the Code That term is used either by itself or in juxtaposition with the term "dishonestly" or together with other terms (e.g. section 209: "fraudulently or dishonestly or with intent to injure or annoy"). "Dishonestly" is dealt with in section 24 of

the Code; this section in conjunction with section 23, leaves no doubt as to the meaning of "dishonestly". In my opinion there can be no doubt that "fraudulently" used in juxtaposition with "dishonestly" must be something different from, although akin to, "dishonestly". As the Judges in a Calcutta Full Bench Case, *Queen-Empress v. Abbas Ali*[5], remarked :—

"The word "fraudulently" is used in section 471 and 464 together with the word "dishonestly" and presumably in a sense not covered by the latter word. If, however, it be held that "fraudulently" implies deprivation, either actual or intended, then, apparently, that word would perform no function which would not have been fully discharged by the word "dishonestly", and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word "fraudulently" should not be confined to transactions of which deprivation of property forms a part."

Support for the view that "fraudulently" does not imply deprivation of property is to be found in other sections of the Code. The only instances in which the word "dishonestly" appears by itself and not in juxtaposition to the word "fraudulently" are sections 378 (theft), 383 (extortion), 403 and 404 (misappropriation of property), 405 (Criminal breach of trust), 411 and 412 (receiving stolen property), 420 (cheating and dishonestly inducing a delivery of property) and 461 and 462 (dishonestly breaking open any closed receptacle containing or supposed to contain property). In all these sections (with the possible exception of the two last mentioned, where however an offence is committed if there is an intent to commit mischief), deprivation of property is a necessary consequence of the offence.

Support for the view that damage or injury or deprivation of property is not an essential element in fraud is also to be found in the definition of forgery in section 463 of the Penal Code. Under that section a person commits forgery if he makes a false document or part of a document with any one of the following intents, viz: intent to cause damage or injury to the public or to any person, intent to support any claim or title, intent to cause any person to part with property, intent to enter into any express or implied contract, and finally intent to commit fraud or that fraud may be committed.

That deprivation or loss is not necessarily implied in the word "fraudulently" is also apparent from sections 261, 262 and 263 of the Code where the expression used is "fraudulently or with intent to cause loss" and from illustration (k) in section 464. The illustrations in the Code make nothing law which would not be law without them; they are merely expository and are intended to facilitate the interpretation of the sections in which they appear. As the framers of the Code remarked: "Thus the Code will be at once a statute book and a collection of decided cases. The decided cases in the Code will differ from the decided cases in the English law books in two most important points. In the first place, our illustrations are never intended to supply an omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the Judges, but by the Legislature, by those which make the law, and who must know more certainly than any Judge can know what the law is which they mean to make" (quoted in *Gour*, Penal Law of British India, 5th ed. p. 114). Illustration (k) was referred to in *Baij Nath Bhagat v. Emperor*[6], where at p. 489 it is stated :—

"In construing the expression "dishonestly and fraudulently" it is important to bear in mind one of the illustrations under section 464 which has a bearing on the question how far loss or risk of loss is an element in fraud as contemplated in the Code."

And in *Queen-Empress v. Soshi Bhushan*[7], Edge C.J. remarked :—

"We can see no difference in principle between the case of a man making a false certificate in order to obtain employment, and the case of a man making a false certificate in order to obtain admission to a law class. In each case the intention is to deceive another person and thereby to obtain an advantage or a privilege, which without such deception, could not have been obtained."

The view of writers on English Criminal Law is in support of the wider interpretation of "fraudulently". Thus the well-known passage of *Sir James Stephen*, in History of Criminal Law, Vol. 2, p. 121, is quoted with approval in both the Calcutta and the Bombay cases. The difference of opinion in these cases arises in relation to the concluding part of *Stephen's* passage where he says: "A practical test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud." In some Indian decisions this passage has been interpreted as meaning that a loss or risk of loss is a necessary ingredient in fraud. Thus Broomfield J. in *Sanjiv Ratanappa Ronad v. Emperor*[3], at p. 501 states :—

"As Sir James Stephen said, it is hardly possible that the author of the deceit should be able to gain an advantage without there being an equivalent in loss or risk of loss to some one else. But there may be occasionally be a case in which the element of loss or injury is absent, and I think the present is such a case."

With due respect I think this interpretation is wrong. Where there is an advantage obtained by deceit there is always a corresponding loss or to use the wide and comprehensive expression, defined in section 44 of the Penal Code, "injury"; to use Sir Frederick Pollock's expression in dealing with Duty and Right, advantage obtained by deceit and injury "are not really more divisible than action and reaction in mechanics." In most cases the injury is tangible in others it is not tangible and is obscured by the advantage obtained. Thus in *Kotamraju Venkatrayadu v. Emperor*[8] there was no financial loss on the part of the University or financial gain on the part of the candidate but there was an advantage obtained by the fabricated certificate which was used as the Court held with the intention of causing loss or detriment to the University — such loss or detriment being the violation of the bye-laws of the University which were intended to protect the University against candidates who are not respectable; it is not stated in this case whether or not the candidate using the fabricated certificate had the qualities of respectability required by the bye-laws but presumably the certificate would have been held to be fraudulent even if he had; in *Baij Nath Bhagat v. Emperor*[6], the injury occasioned by the advantage aimed by the forgery was said to be a fraud upon the Court, in the English case *R. v. Bassey*[9] it was held that the act of the defendant tended to public mischief.

But loss or injury or risk of loss or injury is not a necessary element in fraud; it is sufficient for the prosecution to show that there is an intent to obtain an advantage by the deception; it is not necessary for the prosecution to go further and establish an intent to cause loss or risk of loss.

Support for the wider interpretation of the term "fraudulent" is also to be found in English cases. In *Re London & Globe Finance Corporation Ltd.*[10] Buckley J. said:—

"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Buckley J.'s *dictum* is considered the *locus classicus* on the subject and has been constantly applied in English cases. It was approved and adopted in *Regina v. Wines*[2]. This was a case of a charge under section 1 of the Falsification of Accounts Act, 1875 (the provisions of which have substantially been incorporated in section 477A of the Penal Code); it was held that since the appellant intended by falsification to induce his employers to keep him in their employment and to pay him wages, he was inducing a course of action by his deceit, and intending to defraud his employers. Buckley J.'s *dictum* has also been applied in Indian cases: e.g. Pope J. in *Emperor v. Mohit Kumar Mukerjee*[4].

Mr. Ramani submitted that Buckley J.'s *dictum* is open to criticism and has been criticised; he referred me to *Glanville Williams* on Criminal Law, General Part, pages 76 and 77 para. 26 where it is stated:—

"A learned writer points out that there is a break in this definition of defrauding. It is first defined as deprivation by deceit, but immediately following there is a much wider definition as inducing any course of action. The question arises whether there could be an intent to defraud if D forges a letter in order to induce P to walk to a certain spot. Apparently the courts, influenced by the later part of Buckley J.'s dictum, answer the question in the affirmative. Hence it was held that an intent to obtain admission as a student of the Middle Temple by forgery was an intent to defraud (Rex v. Bassey[9])."

But that the writer goes on to say:—

"Even if the construction must now be accepted as representing the present law, it might well receive the attention of the legislature, because for all practical purposes it seems to efface the legislative distinction between deceiving and defrauding."

Finally I would like to refer to the case of *Starey v. Chilworth Gunpowder Co.*[11]. This was a prosecution under section 2(1) of the Merchandise Marks Act, 1887, for applying a false trade description. I consider this case relevant because the provisions of that section were textually included as section 487 of the Indian Penal Code and it is to be assumed that the legislature did not intend to give to the phrase "with intent to defraud" used in that section a meaning different from the meaning given to that phrase in other sections in the Code. In considering this case it is, of course, to be borne in mind the scope and purpose of the statute which is directed against the abuse of trade marks and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase and believes he is purchasing. But on the question of intent to defraud the Judges of the Divisional Court made it

perfectly clear that pecuniary prejudice is not essential in an intent to defraud. Lord Coleridge said :—

"I agree that if the word 'fraud' is used in the sense of putting off a bad article on a customer in order to get money unfairly, there is no evidence here of anything of the kind having been done. On the contrary it is expressly found that the article supplied was as good as that which was contracted for." And later: "There was an intent to defraud, for what they did was done in order to save their contract, and to make the Government believe they had an article which they had not".

In my opinion, therefore, neither the acquisition nor the deprivation of property is an essential ingredient of the intent to defraud; "fraudulently" does not necessarily connote deceit and injury to the person deceived; it may but it need not do so; a person acts fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person or persons.

In the present case there is no question that the diary was used by the appellant as genuine, that the diary was forged and that the appellant knew or had reason to believe to be forged.

With regard to the diary being a false document within the meaning of sections 463 and 464 it was argued that there is no evidence that the entries in the diary were not true. I do not think it is material whether or not the entries were true. The importance of a diary is that events are recorded therein as they happen and there is no question that the entries were not thus made. Under section 464 a person is said to make a false document who fraudulently makes a document or part of a document with the intention of causing it to be believed that such document or part of a document was made at a time at which he knows that it was not made. That diary was used fraudulently because the appellant used it with the object of producing it as evidence at the inquiry, as a genuine diary, in support of his defence and to corroborate oral evidence at the inquiry and thus deceive the adjudicating officer. The purpose of this deception was to induce the adjudicating officer to clear the appellant of the charge against him and to ensure thereby that the appellant be retained in the service of the Government as a Police Officer or not be subjected to any other disciplinary measure.

The appellant therefore was rightly convicted and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Shearn, Delamore & Co.*